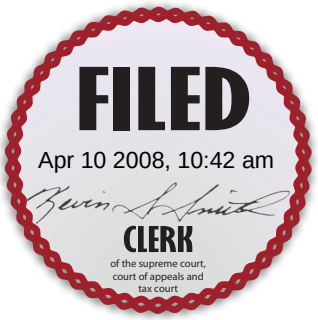

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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE MATTER OF: THE MARRIAGE OF	)	
	)	
LAURA VASS,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 45A03-0710-CV-494
	)	
MICHAEL VASS,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Elizabeth F. Tavitas, Judge
Cause No. 45D03-0610-DR-1125

April 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Laura Vass appeals the division of marital property and child support order in this dissolution action from her ex-husband, Michael Vass. We affirm.

Issues

The restated issues before us are:

I. whether the trial court erred in its treatment of an inheritance Michael received; and

II. whether the trial court erred in its calculation of Michael's income for child support purposes.

Facts

The parties were married in 1989. They had two children during the marriage. In 2000, Michael inherited approximately $300,000.00 as the sole named beneficiary of a will executed by Sidney Misroch. Misroch was a former client of Michael, who is an attorney. Misroch had no close relatives, and it appears his estate would have escheated to the state if he had died intestate. The inherited funds were placed in an account in Michael's name only; Laura was named a beneficiary of the account.

In October 2006, Michael petitioned for divorce. Michael, a sole practitioner, filed tax returns for 2004, 2005, and 2006 that stated net business income of approximately $49,205.00, $70,847.00, and $57,357.00 for those years respectively, after deduction of business expenses from his gross income. In calculating Michael's child support obligation, the trial court averaged his income for those years as based on his tax returns and arrived at a figure of $59,136.33, or $1,137.24 per week.

With respect to the marital property, the trial court found that Michael was entitled to the entire value of the Misroch inheritance. It also rejected Laura's attempts to question the validity of that inheritance. Including the inheritance, the trial court awarded Michael assets totaling $447,794.53; Laura was awarded assets totaling $176,550.59. This equals an award of 71.7% of the marital estate to Michael and 28.3% to Laura. Excluding the inheritance, Laura was awarded approximately 59% of the remaining marital estate. Laura now appeals.

Analysis

The trial court here entered findings of fact and conclusions thereon without a request from either party. "Sua sponte findings control only as to the issues they cover, and a general judgment will control as to the issues upon which there are no findings." Cox v. Cox, 833 N.E.2d 1077, 1079 (Ind. Ct. App. 2005). We will affirm a general judgment entered with findings if it is sustainable on any legal theory supported by the evidence. Id. We employ a two-step process when reviewing a judgment entered with special findings of fact. Id. at 1079-80. First, we determine whether the evidence supports the trial court's findings. Id. at 1080. Second, we determine whether those findings of fact support the trial court's conclusions of law. Id.

Findings will be set aside only if they are clearly erroneous. Id. Findings are clearly erroneous if the record contains no facts to support them, either directly or by inference. Id. A judgment also is clearly erroneous if it applies the wrong legal standard to properly found facts. Id. In order to determine that a finding or conclusion is clearly

erroneous, our review of the evidence must leave us with the firm conviction that a mistake has been made. Id.

I. Division of Marital Property—Inheritance

Laura first challenges the trial court's treatment of the inheritance Michael received from Misroch. The bulk of Laura's argument regarding the inheritance is that Michael somehow acted unethically in being named the sole beneficiary of Misroch's will, or that Misroch lacked testamentary capacity when he named Michael the beneficiary. She asserts that because of this, she is entitled to one-half of the Misroch estate. We offer no opinion on the merits of that claim, because it is irrelevant to this divorce proceeding.

The trial court specifically found that there was no evidence that the validity of the Misroch will or Michael's inheritance was successfully challenged in probate court. Laura does not dispute the accuracy of that finding. Once a probate court has approved an estate's final report and has discharged the personal representative, the probate court's order cannot be collaterally attacked. Fire Police City County Fed. Credit Union v. Eagle, 771 N.E.2d 1188, 1192 (Ind. Ct. App. 2002). Indiana has a long-standing prohibition against collateral attacks. Fackler v. Powell, 839 N.E.2d 165, 169 (Ind. 2005). "The purpose of prohibiting collateral attacks is to avoid 'endless litigation.'" Mishler v. County of Elkhart, 544 N.E.2d 149, 151 (Ind. 1989). To collaterally attack another court's judgment, it must be shown that the judgment is void rather than merely defective or voidable. Id. A judgment is void and subject to collateral attack only if the court that entered the judgment lacked subject matter or personal jurisdiction. K.S. v.

State, 849 N.E.2d 538, 540 (Ind. 2006). Laura makes no argument that the court that probated Misroch's will lacked either subject matter or personal jurisdiction; she therefore cannot seek to set aside the probating of the will through a collateral proceeding.

Even if the will was somehow invalid, we fail to perceive why or how Laura would be entitled to one-half of the inheritance. If indeed Michael should not have inherited that money, it would revert to Misroch's estate for distribution via the laws of intestacy. See Estate of Helms v. Helms-Hawkins, 804 N.E.2d 1260, 1269 (Ind. Ct. App. 2004), trans. denied. In no event would Laura be entitled to one-half of what she essentially claims to be Michael's ill-gotten gain. In other words, we do not believe Laura would have standing to challenge the validity of the will. She is not a potential heir or beneficiary of Misroch's estate. In sum, the trial court correctly rejected Laura's efforts to question the validity of the will and Michael's inheritance.

Laura also challenges the trial court's decision to effectively set aside the entire inheritance to Michael under our dissolution laws. Indiana Code Section 31-15-7-4(a) provides:

> In an action for dissolution of marriage . . . the court shall divide the property of the parties, whether:
>
> (1) owned by either spouse before the marriage;
>
> (2) acquired by either spouse in his or her own right:
>
> (A) after the marriage; and
>
> (B) before final separation of the parties; or

(3) acquired by their joint efforts.

"This statute requires all property owned by the parties before separation to be considered part of the marital estate." Maxwell v. Maxwell, 850 N.E.2d 969, 973 (Ind. Ct. App. 2006), trans. denied. Generally, only property acquired by a spouse after the final separation date is excluded from the marital estate. Id. Inheritances received by one spouse during the marriage are part of the marital estate. See id.

We note that the trial court's treatment of the Misroch inheritance was not entirely consistent throughout its findings and conclusions. For instance, it is not included in the trial court's initial listing of the marital assets. However, the trial court did place a value on the inheritance, thus allowing for a calculation of the marital estate's total value, and entered several findings as to why it believed a deviation from an equal division of the marital property was required with respect to awarding Michael the full value of the inheritance. This is sufficient to permit our review of the distribution of the marital property. See id. (holding that trial court's findings and conclusions as a whole allowed appellate review of trial court's decision to award husband full value of inheritance received by him).

Although whether a trial court's division of marital property is just and reasonable is in some sense a question of law, "it is highly fact sensitive and is subject to an abuse of discretion standard." Id. at 974 (quoting Fobar v. Vonderahe, 771 N.E.2d 57, 59 (Ind. 2002)). "In addressing issues regarding the division of marital property, we are not to weigh evidence and must consider the evidence in a light most favorable to the judgment." Id. "Indiana Code Section 31-15-7-5 provides that an equal division of the

marital property is presumptively reasonable, but that the presumption may be rebutted by evidence of various factors, including whether the property was obtained by one spouse 'through inheritance or gift.'" Id. Additionally, courts may consider whether inherited or gifted property was ever commingled with other marital assets and whether the other spouse directly or indirectly helped prompt the gift or inheritance. See id.

The trial court here specifically found that the assets from the Misroch inheritance never were co-mingled with other marital assets. This finding is supported by the evidence and is not clearly erroneous. The inherited funds were placed in separate accounts in Michael's name only to which Laura had no access, although she apparently was a beneficiary of the accounts in the event of Michael's death. There is no evidence the funds ever were used to purchase joint marital property of any kind. Laura claims that the inheritance was co-mingled with marital property because Michael listed interest income from the inheritance on their joint tax returns, and the income tax on that interest was paid from joint marital funds. We do not believe, however, that the trial court was required to consider this attenuated connection between the inheritance and joint marital property necessarily to be evidence of co-mingling.

The trial court also found that Laura did not contribute to the acquisition or accumulation of the inheritance. Again, this finding is not clearly erroneous. Michael presented evidence that Laura had never even met Misroch, while he often visited Misroch in his nursing home, and had introduced the children to him. This is not at all a case in which both spouses had cared for a person and that person's property before the person's death, which can weigh heavily against setting off an inheritance solely to one

of the spouses. See Eye v. Eye, 849 N.E.2d 698, 704 (Ind. Ct. App. 2006). Only Michael had befriended Misroch, who had no close living relatives to whom he might otherwise have bequeathed his estate.

Awarding the Misroch inheritance completely to Michael does result in a significant deviation from an equal division of the marital property—71.7% to Michael and 28.3% to Laura. The trial court here could have exercised its discretion to award more of the remaining marital property to Laura. The key word here, however, is discretion. Simply because the trial court could have done something differently does not mean it was required to do so. See Maxwell, 850 N.E.2d at 974 (observing that "simply because one appellate decision holds that a certain trial court's division of property was reasonable does not mean that a similar division is required in another case with similar facts."). Laura still was awarded assets totaling over $175,000, including possession of the marital home, and has a job earning approximately $35,000 per year, and will receive $161.48 per week in child support from Michael. We cannot say the trial court clearly erred in its division of the marital estate.

II. Child Support

Laura also challenges the trial court's calculation of Michael's income for purposes of the Indiana Child Support Guidelines. Our supreme court has placed a "strong emphasis on trial court discretion in determining child support obligations." Ratliff v. Ratliff, 804 N.E.2d 237, 244 (Ind. Ct. App. 2004) (quoting Lea v. Lea, 691 N.E.2d 1214, 1217 (Ind. 1998)). A court's first task when fashioning a child support order is to determine the weekly gross income of each parent. Id. at 245. "Weekly gross

income" includes not only actual income from employment but also potential income and imputed income from "in-kind" benefits. Id.

With respect to self-employed individuals and calculating their income for child support purposes, "a trial court is vested with discretion in considering what business deductions may be deducted from gross income." Thompson v. Thompson, 811 N.E.2d 888, 924 (Ind. Ct. App. 2004), trans. denied. Additionally, weekly gross income from self-employment may be different than a determination of business income for tax purposes. Williamson v. Williamson, 825 N.E.2d 33, 44 (Ind. Ct. App. 2005). The Child Support Guidelines state:

> Weekly Gross Income from self-employment, operation of a business, rent, and royalties is defined as gross receipts minus ordinary and necessary expenses. In general, these types of income and expenses from self-employment or operation of a business should be carefully reviewed to restrict the deductions to reasonable out-of-pocket expenditures necessary to produce income. These expenditures may include a reasonable yearly deduction for necessary capital expenditures. Weekly gross income from self-employment may differ from a determination of business income for tax purposes.
>
> Expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business should be counted as income if they are significant and reduce personal living expenses. Such payments might include a company car, free housing, or reimbursed meals.
>
> The self-employed shall be permitted to deduct that portion of their F.I.C.A. tax payment that exceeds the F.I.C.A. tax that would be paid by an employee earning the same Weekly Gross Income.

Ind. Child Support Guideline 3(A)(2) (emphasis added). Laura seems to be arguing in part that self-employment income for child support purposes always should be different from such income for tax purposes. This Guideline, however, clearly states only that such income may be different, not that it necessarily is different.

The trial court had before it Michael's federal income tax returns from 2004, 2005, and 2006. The Schedule Cs from those years, "Profit or Loss from Business," listed Michael's gross income as $81,722.00, $101,738.00, and $94,432.00 respectively. The Schedule Cs also listed deductions for various business expenses, including vehicle expenses and office rent. Based on those deductions, the trial court found Michael's net income for 2004, 2005, and 2006 to be $49,205.00, $70,847.00, and $57,357.00 respectively, for an average of $59,136.33 over those years, or $1,137.24 per week. The trial court specifically found that Michael's deductions on his tax returns were necessary business expenses.[1]

Laura essentially contends the trial court should not have deducted Michael's vehicle and office rent expenses from his gross income. However, Michael testified that the deducted vehicle expenses were for mileage associated with visiting clients, going to court, and so forth. This would not be comparable to deducting the full cost and expense associated with the vehicle, including for personal use. As for the office, Michael testified as to his rental use of that office and how much he was charged for it. Laura

[1] There is an unexplained discrepancy in the record, because Michael's tax returns for 2004 and 2005 list net income of $47,136.00 and $67,481.00, respectively, which differs slightly from what the trial court found to be Michael's net income in those years. Neither Laura nor Michael discusses this discrepancy in their briefs.

seems to have argued before the trial court that this actually was a home office, but that is contrary to what Michael testified to; on appeal, we must accept the evidence most favorable to the trial court's ruling, which was that the office rent was a necessary business expense for an office outside the home. In sum, we cannot say the trial court erred in calculating Michael's net income for 2004, 2005, and 2006, and averaging those three years' net income to determine his child support obligation.

Laura also argues that Michael was voluntarily underemployed in the years 2004, 2005, and 2006, and that he is capable of earning much more than what he reported for those years. "When determining whether and in what amount potential income should be attributed to a parent because of his or her voluntary underemployment, courts should consider the obligor's work history, occupational qualifications, prevailing job opportunities, and earnings levels in the community." Carmichael v. Siegel, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001). One purpose of potential income is to discourage a parent taking a lower-paying job in order to avoid the payment of significant child support. Id. Child support orders should not be used to force parents to work to their full economic potential or make their career decisions based strictly upon income. Id. at 625-26. "Also, there is no basis for determining that a parent is underemployed when the level of his or her earnings has remained relatively constant over a number of years." Id. at 626.

Here, the trial court had before it evidence of Michael's reported earnings from 1998 through 2006. His average Schedule C net income for those nine years was $66,476.24. There were two years, 2002 and 2003, in which Michael's net income was significantly higher than average, when he earned net income of $95,447.00 and

$86,774.19 respectively. Those two years out of the nine obviously boosted his overall average net income.

Laura seems to argue that after 2003, Michael began planning to divorce her and began intentionally earning less income. She bases this argument on emails he sent in the summer of 2006, when he told a relative that he had an "exit plan" or "timetable" and that he had "all his ducks in order . . . ." Ex. D. These vague comments do not necessarily mean what Laura interprets them to mean, i.e. that Michael had been intentionally earning less income than usual over the past two years in order to lower his potential child support obligation in the event of divorce. Certainly, the trial court was not required to give that interpretation to those comments. Based on Michael's average net income over a nine-year period, the trial court was not required to find that his average net income of $59,136.33 during the three years before the divorce constituted voluntary underemployment for the purpose of shirking a child support obligation. In other words, the trial court reasonably could have considered Michael's high-income years of 2002 and 2003 to be the exception to the rule with respect to his average earning ability. The trial court's calculation of Michael's income and resulting child support obligation was not clearly erroneous.

Conclusion

The trial court's treatment of the Misroch inheritance in dividing the marital estate was not clearly erroneous. Additionally, it did not clearly err in its calculation of Michael's income for child support purposes. We affirm.

Affirmed.

SHARPNACK, J., and VAIDIK, J., concur.